

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 246 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

PRAJAPATI BABIBEN

Versus

PRAJAPATI MANIBEN

Appearance:

1. Appeal from Order No. 246 of 2001
MR PK JANI for Appellant
MR MEHUL SHARAD SHAH for Respondents No. 1-2
RULE SERVED for Respondent No. 3

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 22/01/2002

C.A.V. JUDGEMENT

1. This is an Appeal from Order under Section 104 of the Civil Procedure Code read with Order-43, Rule-1(r) of the Civil Procedure Code filed by the original plaintiff No.2 of Special Civil Suit No.225 of 2000, which is

pending on the file of 4th Joint Civil Judge (S.D.), Mehsana challenging an order dated 6/1/2001 passed below Exh.6 in the aforesaid suit.

2. The present appellant is the plaintiff No.2, whereas the respondent No.1 is the defendant No.1 in the aforesaid suit. Respondent No.2 is defendant No.2 while respondent No.3 is a plaintiff No.1 (For the sake of brevity and convenience the parties shall be referred to hereinafter as the respective plaintiffs and respective defendants).

3. The facts leading to this appeal in nutshell are as follows :-

The plaintiff No.1 is an elder sister of plaintiff No.2 and defendant No.1 is a widow of real elder brother of both the plaintiffs.

The plaintiffs filed a Special Civil Suit No.225 of 2000 in the Civil Court (S.D.), Mehsana against the two defendants, one of them i.e. defendant No.1, who is a widow of elder brother of plaintiffs, while defendant No.2 is a third party to whom the defendant No.1, by a registered sale deed, sold the agricultural land bearing Block No.247, admeasuring 0 hector, 34 are and 39 sq.mtr. on 24/4/2000. This agricultural land is known as "Makrolia" field. This property is described in sub-para-(a) of para-3 of the plaint.

It is the case of the plaintiffs that the plaintiffs and husband of defendant No.1 are the direct heirs and legal representatives of deceased Dungarbhai Dosabhai Prajapati, who was owning four different properties described in sub-paras- (a), (b), (c) and (d) of para-3 of the plaint. The said Dungarbhai Dosabhai Prajapati, who was the father of plaintiffs and husband of defendant No.1, died on or about 18/1/1972. The husband of defendant No.1, who was alive on that day got the entries for suit properties mutated in the revenue record in his name. It is the case of the plaintiffs that the husband of defendant No.1 Kalabhai Dungarbhai Prajapati got entry No.551 in his name mutated in the revenue record. The pencil entry was made on 10/4/1974 and after following due procedure, the Revenue Authority made a pakka entry on 10/12/1974.

Thereafter, the husband of defendant No.1 died on or about 5/9/1982 and hence, the defendant No.1 got entry No.725 mutated in her name. First pencil entry was made on 30/12/1988 and later on its pakka entry was made by

Revenue Authority on 6/4/1989.

Thereafter, defendant No.1 sold property described in sub-para-(a) of para-3 of the plaint to defendant No.2 on or about 24/4/2000. Coming to know about such sale, the plaintiffs filed the aforesaid Special Civil Suit No.225 of 2000, on or about 29/5/2000 for a decree of declaration to the effect that the sale-deed dated 24/4/2000 executed by defendant No.1, in favour of defendant No.2, is illegal, null and void. The plaintiffs have prayed for possession of the said land which is sold to defendant No.2. The plaintiffs have also prayed for a perpetual prohibitory injunction restraining the defendants to transfer the suit properties by way of sale, mortgage, gift or any other mode to any person.

On the day on which, the plaintiffs filed the aforesaid suit, they also filed an application Exh.6 under Order-39, Rules-1 and 2 of the Civil Procedure Code read with Section 151 of the Civil Procedure Code for interim injunction restraining defendants from transferring and disposing of all the four properties or any of them described in para-3 of the plaint to any person till the final disposal of the suit, by way of sale, mortgage, gift or any other mode. It appears from the record that on 29/5/2000, the learned Judge of the trial Court passed an order to issue show cause notices against the defendants. Pursuant to that order, notices were issued against the defendants and both the defendants filed their joint written statement at Exh.17, in reply to the plaint as well as application Exh.6. Both the parties filed their respective affidavits and produced certain documents in the suit. After hearing the learned advocates for both the parties, the learned Judge of the trial Court passed an order on 6/1/2001 below application Exh.6 and by that order, the learned Judge of the trial court decided not to give any type of interim injunction prayed for in application Exh.6, meaning thereby application below Exh.6 came to be dismissed.

4. Being aggrieved against and dissatisfied with the aforesaid order dated 6/1/2001 passed below application Exh.6 in Special Civil Suit No.225 of 2000, which is pending on the file of 4th Joint Civil Judge (S.D.), Mehsana, only plaintiff No.2 has preferred this present appeal against both the defendants. The plaintiff No.2 has joined plaintiff No.1 as respondent No.2 in this appeal.

5. This appeal came to be admitted on 13/8/2001. Notices with regard to admission of an appeal were issued. In this appeal, the respondent No.3 i.e. plaintiff No.1 has remained absent, though duly served.

6. I have heard Mr.Unwala, learned advocate for and on behalf of Mr.P.K.Jani, learned advocate for the appellant and Mr.Mehul Shah, learned advocate for the respondents No.1 and 2 at length. Mr.Mehul Shah has assisted this Court by producing the copies of the plaint, written statement and copy of the list Exh.22. I have perused the impugned order, which is challenged in this appeal.

7. This Court is conscious with regard to scope and powers of this Court for dealing with such appeal under Section 104 read with Order-43, Rule-1(r) of the Civil Procedure Code. Generally, the powers of the Appellate Court in the matter of injunction are circumscribed and the Appellate Court would be slow to interfere with the exercise of discretion. If, it appears to the Appellate Court that in exercising its discretion, the trial Court has acted unreasonably or capriciously or has ignored relevant facts, then it would certainly be open to the Appellate Court to interfere with the trial Court. The exercise of discretion to interfere by the Appellate Court will be legally permissible only where the order under appeal is passed by the Court below acting unreasonably or capriciously or ignoring the relevant facts and adopting an unjudicial approach.

8. Keeping in mind, the aforesaid legal position, the submissions of learned advocates for both the parties are dealt with.

9. Mr.Unwala, learned advocate for the appellant has argued that looking to the impugned order, the following facts are not in dispute:

- a. The original ancestor Dungarbhai Dosabhai Prajapati was the father of plaintiffs and Kalabhai i.e. husband of the defendant No.1. Thus, plaintiffs and Kalabhai are the direct heirs and legal representatives of said Dungarbhai Dosabhai Prajapati.
- b. Dungarbhai Dosabhai Prajapati was having three properties described in sub-para-(a), (c) and (d) of para-3 of the plaint. From the side of respondent Nos.1 and 2, there is a dispute to the

effect that plaintiffs have not produced any documentary evidence to show that one Khodabhai Haribhai - cousin brother of plaintiffs and Dungarbhai Dosabhai Prajapati were the co-owners of the agricultural land bearing Block No.292. This property is described in sub-para-(b) of para-3 of the plaint.

c. Each of plaintiffs and husband of defendant No.1 has got 1/3rd share in the properties of Dungarbhai Dosabhai Prajapati.

d. Dungarbhai Dosabhai Prajapati died on 18/1/1972. It is admitted fact that before 18/1/1972 or after 18/1/1972, no partition has been effected for the properties owned by the original ancestor Dungarbhai Dosabhai Prajapati.

10. As per the arguments of learned advocates for both the parties, after the death of original ancestor Shri Dungarbhai Dosabhai Prajapati, the husband of defendant No.1 got the entries mutated for the aforesaid four properties in his name. For such mutation, first pencil entry was made in the revenue record and after following due procedure, the Revenue Authority made a pakka entry No.551 on 10/12/1974. Mr.Mehul Shah, learned advocate for the respondent Nos.1 and 2 has vehemently argued that before making a pakka entry No.551, the concerned Revenue Authority issued a notice under Section 135(D) of the Land Revenue Code to all the heirs and legal representatives of the deceased Dungarbhai Dosabhai Prajapati and at that time, the present plaintiffs appeared before the Revenue Authority and gave consent for entry being mutated in the name of their brother Kalabhai Dungarbhai. He has further argued that by giving consent for entry being mutated in the name of their brother Kalabhai Dungarbhai, the plaintiffs had given up or so to say abandoned their rights in the properties in favour of their brother Kalabhai and, therefore, now the plaintiffs cannot claim any right, title or interest in the suit properties.

11. In the same manner, after death of Kalabhai Dungarbhai i.e. the brother of plaintiffs, the defendant No.1 got the entry no.725 mutated in her name. First pencil entry was made on 30/12/1988 and thereafter, after following due procedure as required to be followed by the Land Revenue Code, a pakka entry No.725 was made on 6/4/1989. It is not the case of the defendants that when entry No.725 was mutated in the name of defendant No.1,

the plaintiffs gave no objection to the Revenue Authority. It is the case of the defendants that the plaintiffs sat silent for so many years, after 10/12/1974. Had they having their share in the suit properties, they would not have given a consent for entry No.551 being mutated, which came to be finally registered on 6/4/1989. The plaintiffs would not have sat silent after 6/4/1989. For the first time, they have advanced their case claiming their shares in the properties of Dungarbhai Dosabhai Prajapati by filing the suit. It is the case of the defendants that the suit is not maintainable, as it is ex-facie time barred. Such contentions have been dealt with by the learned Judge of the trial Court.

12. The learned Judge of the trial Court has come to a conclusion that plaintiffs have got no prima facie case and for arriving at this conclusion, he has blindly placed reliance on Entry No.551 (Mark 22/3) and Entry No.725 (Mark 22/4). The main thrust of arguments of Mr.Mehul Shah is to the effect that when the aforesaid two entries were mutated, the plaintiffs did not object and, therefore, the plaintiffs had given up their right, title and interest in the properties in favour of their brother - Kalabhai Dungarbhai and later on in favour of defendant No.1. The learned Judge of the trial Court has rightly observed in para-10 (internal page-8) of the impugned order that the plaintiffs are the heirs and legal representatives of the original ancestor. The learned Judge of the trial Court has rightly observed that it can finally be decided after allowing both the parties to lead evidence as to whether plaintiffs had given up or abandoned their right, title or interest in the suit properties or not. Meaning thereby at one breath, the learned Judge of the trial Court accepted the case of the plaintiffs that the plaintiffs have got their shares in the suit properties and at the second breath, he accepted the case of the defendants that the plaintiffs have given up abandoned their right, title or interest in the suit properties by giving consent to the Revenue Authority, when Entry No.551 and Entry No.725 were mutated. At the same time, the learned Judge of the trial Court has also observed that it would be decided whether the plaintiffs have given up their right, title or interest in the suit properties. The learned Judge of the trial Court has very much observed that this can only be decided after recording the evidence. In view of this, indirectly the learned Judge of the trial Court accepted the case of the plaintiffs as prima facie case, but he has negatived the case of the plaintiffs saying that plaintiffs have given up or abandoned right, title

or interest in the suit properties at the time of mutation of entries being recorded in the revenue record.

13. Mr.Unwala has argued that admittedly no partition has been effected till now, after the death of father of the plaintiffs and Kalabhai. An entry No.551 was mutated in the name of Kalabhai when admittedly, the properties are of joint family of Dungarbhai Dosabhai Prajapati. Naturally, after death of father of plaintiffs, the properties will be mutated in the name of elder son. Herein this case Kalabhai is the elder son of Dungarbhai Dosabhai Prajapati. A male person in his capacity as Karta can represent a joint family. A male person can administer the properties as a Karta of joint family till the full partition of the properties of joint family is effected. No female member can represent herself as Karta of joint family when brother was alive and, therefore, by mere Entry No.551, which was mutated in the name of Kalabhai, it cannot be inferred that he became sole exclusive owner of the properties. The properties were mutated in his name, because he was only the male member and Karta of joint family. When admittedly, the partition has not been effected, it can well be inferred that the suit properties are still joint and they are still undivided amongst the plaintiffs and Kalabhai. After the death of Kalabhai, defendant No.1 got properties mutated in her name because she was a wife of Kalabhai. It is not the case of defendants that at the time of mutation of entry No.725, the plaintiffs gave their consent to the Revenue Authority. In view of this, defendants relied on revenue entries for claiming their case that Kalabhai was sole and exclusive owner of the properties and plaintiffs had given/abandoned up their right, title or interest in the suit properties, when first entry No.551 was mutated in the name of Kalabhai.

14. Mr.Unwala has argued that the entries made in the revenue records have primarily a fiscal value and they do not create any title. For this, he has placed reliance on the case of Siddharthbhai B. Shah & Others v/s. State of Gujarat & others, reported in 1999 (3) 40 G.L.R. 2527. It has been observed in para-3 of this cited case that it is now well settled that entries made in the revenue records have primarily a fiscal value and they do not create any title. In view of this, the learned Judge of the trial Court has blindly placed reliance on Entry Nos.551 and 725 for arriving at a conclusion that the plaintiffs have given up/abandoned their right, title or interest in the suit properties in favour of Kalabhai. The learned Judge of the trial Court has not taken into consideration above legal position with regard to such

entries made in the revenue records and, therefore, the learned Judge of the trial Court has passed an order ignoring the well settled legal position with regard to entries made in the revenue records. In view of this, the conclusion arrived at by the learned Judge of the trial Court is erroneous and it is required to be rectified at the earliest. In view of this, the impugned order is required to be set aside and application below Exh.6 presented by the plaintiffs is required to be allowed and granted.

15. Mr.Mehul Shah has argued that application below Exh.6 cannot be allowed for the property described in sub-para-(b) of para-3 of the plaint. As per the case of the plaintiffs, this property is an agricultural land bearing Block No.292, and it is of co-ownership of cousin brother of Khodabhai Haribhai and original ancestor Dungarbhahi Dosabhai Prajapati. As per the case of the plaintiffs, jointly the heirs and legal representatives of Dungarbhahi Dosabhai Prajapati have their 1/2 share in the said property described in sub-para-(b) of para-3 of the plaint. Mr.Mehul Shah has also argued that plaintiffs have not produced any documentary evidence to show that this agricultural land bearing Block No.292 is of co-ownership of Khodabhai Haribhai and Dungarbhahi Dosabhai Prajapati and, therefore, no relief can be granted for this property. An application under Section 39, Rules 1 and 2 of the Civil Procedure code can be decided either by affidavit or documents. Here in this case, admittedly, the plaintiffs have produced affidavit in terms of the plaint. The defendants have mentioned in their written statement that they have also produced affidavit in terms of written statement. If we read written statement Exh.17 of defendants we find that they have nowhere stated that property described in sub-para-(b) of para-3 is not jointly owned by Khodabhai Haribhai and Dungarbhahi Dosabhai Prajapati. When plaintiffs have stated in affidavit produced by them that this property is of joint ownership of Khodabhai Haribhai and father of plaintiffs then at present this averment stated on oath is to be accepted particularly, when defendants have not specifically denied that averment in their written statement. The suit will be decided finally on the strength of oral evidence as well as documentary evidence. If plaintiffs will fail to prove that the agricultural land bearing Block No.292 is of joint ownership of Khodabhai Haribhai and father of plaintiffs then Civil Court will not grant relief for that property, but at present prima facie case is made out by the plaintiffs that each of them has got her 1/3rd share in 1/2 the property described in sub-para (b) of

para-3 of the plaint. In view of this, the contention taken by Mr.Mehul Shah, is negatived.

16. In view of, what is stated hereinabove, the impugned order is required to be set aside and the application below Exh.6 presented by the plaintiffs is required to be allowed and granted. Accordingly, the application Exh.6 presented in Special Civil Application No.225 of 2000 is granted and the relief prayed for in para-6 of the said application Exh.6 is granted. This order shall remain effective and operative till the final disposal of the suit.

17. Accordingly this appeal is allowed. The impugned order is hereby set aside. The relief in terms of para-6 of the application Exh.6 is granted. No order as to costs.

(H.H.Mehta,J.)

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